Petition

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF OREGON

Petitioner,

v.

PATRICIA ANN NEWMAN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

When a police officer takes an apparently intoxicated 19-year-old motorist into civil custody for detoxification and the motorist gives the police officer false information as to her identity, does the Fourth Amendment prohibit the officer from conducting a contemporaneous search of the motorist's purse for identification?

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	6
Reasons for Granting the Writ	11
Conclusion	33
Appendix A	37
Appendix B	48
Appendix C	56

TABLE OF AUTHORITIES

Cases Cited — Page

Adams v. Williams, 407 U.S. 143 (1972) 19, 20

Arkansas v. Sanders, 442 U.S. 753 (1979) 9, 10, 22

Brown v. Texas, 443 U.S. 47 (1973) 19

Cady v. Dombrowski, 413 U.S. 433 (1973) 16, 17, 18, 20

Camara v. Municipal Court, 387 U.S. 523 (1967) 17, 29

Compagnie Francaise v. Board of Health, 186 U.S. 380 (1902) 29

Cooper v. California, 386 U.S. 59 (1967) 17

Cupp v. Murphy, 412 U.S. 291 (1973) 24

Dunaway v. New York, 442 U.S. 200 (1979) 24, 27

Evans v. State, 364 So.2d 93 (Fla. App. 1978) 30

Guardiola v. State, 375 N.E.2d 1105 (Ind. 1978) 30

Gustafson v. Florida, 414 U.S. 260 (1973) 20, 22, 26, 27

Harris v. United States, 390 U.S. 234 (1968) 17

Holker v. Hennessey, 141 Mo. 527, 42 S.W. 1090 (1897) 21

Howell v. State, 300 So.2d 774 (Miss. 1974) 30

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 29

Mapp v. Ohio, 367 U.S. 643 (1961) 16

Michigan v. Tyler, 436 U.S. 499 (1978) 17, 29, 30

Mincey v. Arizona, 437 U.S. 385 (1978) 17, 29, 30

New York v. Belton, —— U.S. ——, 101 S Ct 2860, 69 L.Ed. 2d 768 (1981) 11, 20, 22, 27

North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) 29

Patella v. State, 367 S.W.2d 340 (Tex. Cir. App. 1963) 30

People v. Gonzales, 182 Cal. App. 2d 276, 5 Cal. Rptr. 920 (1960) 30

People v. Longwill, 14 Cal. 3d 943, 123 Cal. Rptr. 297, 538 P.2d 753 (1975) 24

People v. Maher, 17 Cal. 3d 196, 130 Cal. Rptr. 508, 550 P.2d 1044 (1976) 24

People v. Smith, 47 Ill.2d 161, 265 N.E.2d 139 (1970) 30

Peter v. State, 531 P.2d 1263 (1975) 24

South Dakota v. Opperman, 428 U.S. 364 (1976) 10,17, 20, 23

State v. Agent, 101 N.J. Super. 190, 243 A.2d 846 (1968) 30

TABLE OF AUTHORITIES—Continued

Page

State v. Brown, 291 Or. 642, 634 P.2d 212 (1981) 10
State v. Flynn, 92 Wis. 2d 427, 285 N.W.2d 710 (1979) 19
State v. Jordan, 79 Wash.2d 484, 487 P.2d 617 (1971) 30
State v. Kennel, 26 Ariz. App. 147, 546 P.2d 1156 (1976) 26
State v. Prober, 98 Wis.2d 345, 297 N.W.2d 1 (1980) 30
State v. Tourtillott, 289 Or. 835, 618 P.2d 423 (1980) 10
United States v. Chadwick, 433 U.S. 1 (1977) 9, 22
United States v. Dunavan, 485 F.2d 201 (6th Cir. 1973) 30
United States v. Gallop, 606 F.2d 836 (9th Cir. 1979) 23
United States v. Haley, 581 F.2d 723 (8th Cir. 1978) 30
United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980) 24
United States v. Robinson, 414 U.S. 218 (1973) 11, 20, 22, 23, 25, 26, 27
United States v. Williams, 622 F.2d 830 (5th Cir. 1980) 32
Vauss v. United States, 370 F.2d 250 (D.C. Cir. 1966) 30
Waiden v. State, 397 So.2d 368 (Fla. App. 1981) 24
Wayne v. United States, 115 U.S. App. D.C. 234, 318 F.2d 221 (D.C. Cir. 1963) 29

United States Constitutional and Statutory Provisions

U.S. Const., Amend. IV 2
U.S. Const., Amend. XIV, § 1 2
28 U.S.C. § 1257(3) 1

Oregon Constitutional and Statutory Provisions

O.R.S. 133.455 23
O.R.S. 426.450 2
O.R.S. 426.460 ..... 3, 12, 15
O.R.S. 426.[illegible] 4, 32
O.R.S. 430.315 14
O.R.S. 475.992 9
O.R.S. 482.610 9
Or Laws 1971, ch 622 13

Other Authorities

Uniform Alcoholism and Intoxication Treatment Act, § 12 (1971) 4

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
9 Uniform Laws Annotated 57 (West, 1979)	13
Commissioner's Prefatory Note, 9 Uniform Laws Annotated	14
Minutes, Oregon House of Representatives, Committee on Health, Education and Welfare, May 7, 1971	14
Wash. Rev. Code Ann. § 70.96A.120(2)	23

Petitioner, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Oregon Supreme Court entered in *State of Oregon v. Patricia Ann Newman* on December 9, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon is reported as *State v. Newman,* 292 Or. 216, 637 P.2d 143 (1981). By its judgment in the matter, the Oregon Supreme Court reversed the decision of the Oregon Court of Appeals, reported as *State v. Newman,* 49 Or. App. 313, 619 P.2d 930 (1980), and affirmed the decision of the Circuit Court of the State of Oregon for Multnomah County which had entered pretrial orders suppressing evidence and dismissing criminal charges against the respondent. The opinion of the Oregon Supreme Court is attached to this petition as Appendix A. The decision of the Oregon Court of Appeals is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The time for filing this petition for a writ of certiorari was extended by an order of this Court, dated February 2, 1982, until March 1, 1982. This petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statutes [hereinafter referred to as "O.R.S."] 426.450:

> "Any person may voluntarily apply for admission to any treatment facility, as defined in ORS 430.306, operated pursuant to rules of the Mental Health Division. The director of the treatment facility shall determine whether the person shall be admitted as a patient, or referred to another appropriate treatment facility or denied referral or admission. If the person is 18 years of age or an incompetent, the director of the treatment facility shall notify the person's parents or guardian of the admission or referral."

O.R.S. 426.460:

"(1) Any person who is intoxicated or under the influence of controlled substances in a public place may be taken or sent home or to a treatment facility by the police. However, if the person is incapacitated, the health of the person appears to be in immediate danger, or the police have reasonable cause to believe the person is dangerous to self or to any other person, the person shall be taken by the police to an appropriate treatment facility. A person shall be deemed incapacitated when in the opinion of the police officer or director of the treatment facility the person is unable to make a rational decision as to acceptance of assistance.

"(2) The director of the treatment facility shall determine whether a person shall be admitted as a patient, or referred to another treatment facility or denied referral or admission. If the person is incapacitated or the health of the person appears to be in immediate danger, or if the director has reasonable cause to believe the person is dangerous to self or to any other person, the person must be admitted.

"(3) In the absence of any appropriate treatment facility, an intoxicated person or a person under the influence of controlled substances who would otherwise be taken by the police to a treatment facility may be taken to the city or county jail where the person may be held until no longer intoxicated, under the influence of controlled substances or incapacitated.

"(4) Within 24 hours after admission, the director of the treatment facility or officer in charge of the jail shall notify in writing a court having probate jurisdiction in the county where the treatment facility or jail is located of the admission of the person. Unless the person has within 48 hours

applied for voluntary admission to the treatment facility the person shall be discharged.

"(5) An intoxicated person or person under the influence of controlled substances, when taken into custody by the police for a criminal offense, shall immediately be taken to the nearest appropriate treatment facility when the condition of the person requires emergency medical treatment.

"(6) The records of a patient at a treatment facility shall not be revealed to any person other than the director and staff of the treatment facility without the consent of the patient. A patient's request that no disclosure be made of admission to a treatment facility shall be honored unless the patient is incapacitated or disclosure of admission is required by ORS 426.450 or by subsection (4) of this section.

"(7) As used in this section, 'treatment facility' has the meaning given that term by section 2, chapter 795, Oregon Laws 1973."

O.R.S. 426.470:

"No peace officer, treatment facility and staff, physician or judge shall be held criminally or civilly liable for actions pursuant to ORS 426.450 to 426.470, 430.100 and 430.315 to 430.335 provided he acts in good faith, on probable cause and without malice."

Uniform Alcoholism and Intoxication Treatment Act, Section 12 (National Conference of Commissioners on Uniform State Laws, 1971):

"(a) An intoxicated person may come voluntarily to an approved public treatment facility for emergency treatment. A person who appears to be intoxicated in a public place and to be in need of help, if he consents to the proffered help, may be assisted to his home, an approved public treatment

facility, an approved private treatment facility, or other health facility by the police or the emergency service patrol.

"(b) A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police or the emergency service patrol and forthwith brought to an approved public treatment facility for emergency treatment. [If no approved public treatment facility is readily available he shall be taken to an emergency medical service customarily used for incapacitated persons.] The police or emergency service patrol, in detaining the person and in taking him to an approved public treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

"(c) A person who comes voluntarily or is brought to an approved public treatment facility shall be examined by a licensed physician as soon as possible. He may then be admitted as a patient or referred to another health facility. The referring approved public treatment facility shall arrange for his transportation.

"(d) A person who by medical examination is found to be incapacitated by alcohol at the time of his admission or to have become incapacitated at any time after his admission, may not be detained at the facility (1) once he is no longer incapacitated by alcohol, or (2) if he remains incapacitated by alcohol for more than 48 hours after admission as a patient, unless he is committed under Section 13. A person may consent to remain in the facility as

long as the physician in charge believes appropriate.

"(e) A person who is not admitted to an approved public treatment facility, is not referred to another health facility, and has no funds, may be taken to his home, if any. If he has no home, the approved public treatment facility shall assist him in obtaining shelter.

"(f) If a patient is admitted to an approved public treatment facility, his family or next of kin shall be notified as promptly as possible. If an adult patient who is not incapacitated requests that there be no notification, his request shall be respected.

"(g) The police or members of the emergency service patrol who act in compliance with this section are acting in the course of their official duty and are not criminally or civilly liable therefor.

"(h) If the physician in charge of the approved public treatment facility determines it is for the patient's benefit, the patient shall be encouraged to agree to further diagnosis and appropriate voluntary treatment."

STATEMENT OF THE CASE

At about 5:30 a.m. on October 13, 1979, Portland police officer Kenneth Pacheco observed an automobile, parked inside the fog line on McLoughlin Boulevard, in a block where parking was prohibited by a posted sign. (Tr. 2, 11-12). As Pacheco drove past the automobile, he saw that both its left-side tires were flat and that someone was inside, behind the steering wheel, with his or her head either leaning against or tilted toward the driver's side window. (Tr. 3). Pacheco

stopped his police car and approached the disabled vehicle, both because it was illegally parked and because he assumed that the vehicle had been in an accident and its occupant was "maybe hurt or passed out behind the wheel" (Tr. 3, 12). After knocking on the window and observing no reaction, he opened the door and shook the driver awake. (Tr. 3-4). The driver, respondent herein, was the sole occupant of the automobile. (Tr. 10-11).

Respondent had a "moderate amount of alcohol on her breath," and Pacheco assumed that she was intoxicated. (Tr. 4, 13, 16-17). He asked respondent how old she was, and respondent replied that she was 22. (Tr. 4). Pacheco thought she looked distinctly younger. (Tr. 4, 8). He asked respondent for identification; and after repeated requests, during which respondent kept saying she wanted to go home, respondent produced a driver's license from her purse, which bore the name of "Catherine Newman," whose age, according to the license, was 22, and whose photograph on the license did not resemble respondent. (Ex. 1; Tr. 4-5, 6-7).

Pacheco then asked respondent for the telephone number of someone who could verify her identity. (Tr. 5). Respondent gave Pacheco a telephone number, but the person reached at that number denied knowing anyone named Newman. (Tr. 5-6). Pacheco next asked respondent for her parents' telephone number, "or something so that I could take her somewhere"; and

respondent replied, "Well, take me wherever you want, but don't call my parents." (Tr. 6).

During this period, respondent's behavior "ranged from being hysterical to crying to being antagonistic and extremely moody," although she was not violent. (Tr. 6, 11). Respondent did not answer when Pacheco addressed her as Catherine, and Pacheco believed that she had given him false identification. (Tr. 6-7).

At this point, Pacheco took respondent into custody, "on a civil hold," intending to take her either "to the detox or the booking facility." (Tr. 7). He did not, at this time, contemplate charging respondent with any violation of the criminal law. (Tr. 12-13). Before he placed respondent in the back seat of the police car, he handcuffed her, "so she wouldn't be thrashing about in the back seat," a procedure to which respondent offered some resistance. (Tr. 7, 11).

After respondent was placed in the police car, Pacheco went back to respondent's automobile and found respondent's purse on the ground. (Tr. 7). He opened the purse, in order to look for identification, and immediately saw inside a plastic bag of white cross-topped pills, which he recognized as amphetamine tablets. (Ex. 3; Tr. 7, 11, 14, 15). He looked further through the purse and found respondent's wallet and an amber-colored vial containing other pills. In the wallet, he found respondent's actual driver's

license, identifying her as Patricia Ann Newman, age 19. (Ex. 2, 3; Tr. 7-9).

Pacheco returned to the police car, advised respondent of her constitutional rights, and questioned her. (Tr. 9-10). Respondent indicated that she knew the pills in her purse were amphetamine tablets and at first acknowledged that they were hers, but later claimed that "she was just carrying them for somebody." (Tr. 10). She also told Pacheco that Catherine Newman, whose driver's license she had originally given him, was her sister. (Tr. 10).

Respondent was charged in a two-count accusatory instrument with the crimes of possession of a controlled substance in violation of O.R.S. 475.992 and misuse of a driver's license in violation of O.R.S. 482.610.

Prior to trial on these charges, respondent moved to suppress

> "... any and all evidence seized on or about October 13, 1979, from or about the person of the defendant that may be used against her in [this case, on the ground that] [s]aid evidence was unreasonably seized without a warrant and in violation of federal and state constitutions, statutes, and case law."[1]

After the hearing on respondent's motion, at which Officer Pacheco was the sole witness, the state's attor-

[1] In the points and authorities attached to this motion, respondent specifically relied on the cases of *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979).

ney argued that, under the circumstances, the officer was not required to obtain a search warrant and the warrantless search was reasonable. (Tr. 18-20, 28-29). The trial court orally allowed respondent's motion to suppress, based upon its reading of *Arkansas v. Sanders,* 442 U.S. 753 (1979) and Oregon Supreme Court precedents applying the rule of that case. (Tr. 27-29). The State declined to proceed to trial, and, upon respondent's motion, the court dismissed both charges. (Tr. 30). The State of Oregon appealed this pretrial order to the Oregon Court of Appeals.

The Oregon Court of Appeals reversed the trial court's order and remanded the case for trial. *State v. Newman, supra,* 49 Or. Ap. at 321, 619 P.2d at 934. The court resolved respondent's constitutional claims on the basis of this Court's analysis in *South Dakota v. Opperman,* 428 U.S. 364 (1976). *State v. Newman, supra,* 49 Or. App. at 317, 619 P.2d at 932. It concluded that the officer acted reasonably in opening the respondent's purse to look for identification. 49 Or. App. at 320, 619 P.2d at 934.

The Oregon Supreme Court allowed the respondent's petition for discretionary review. A 4-3 majority of that court reversed the decision of the Oregon Court of Appeals. *State v. Newman, supra,* 292 Or. at 224, 637 P.2d at 147. Relying on its analysis in its prior Fourth Amendment decisions, *State v. Brown,* 291 Or. 642, 634 P.2d 212 (1981) and *State v. Tourtillott,* 289

Or. 835, 618 P.2d 423 (1980), the court held that the officer's action in this case was constitutionally unreasonable. *State v. Newman, supra,* 292 Or. at 221, 637 P.2d at 146. In so holding, the Oregon Supreme Court expressly distinguished this Court's decisions in *New York v. Belton,* —— U.S. ——, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) and *United States v. Robinson,* 414 U.S. 218 (1973). *State v. Newman, supra,* 292 Or. at 223 n. 6, 637 P.2d at 146-147 n. 6. The court ruled that the officer's search of the respondent's purse was unreasonable because he did not need to know the identity of the respondent in order to transport her to a treatment or holding facility. *State v. Newman, supra,* 292 Or. at 222, 637 P.2d at 146.

REASONS FOR GRANTING THE WRIT

I.

THE OREGON SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE FOURTH AMENDMENT IN THE CONTEXT OF THE POLICE 'COMMUNITY CARETAKING' FUNCTION. THE ISSUE OF THE CONSTITUTIONAL LIMITATIONS ON POLICE AUTHORITY TO CONDUCT IDENTIFICATION SEARCHES OF PUBLICLY INTOXICATED PERSONS IS A SIGNIFICANT FEDERAL QUESTION BECAUSE A MAJORITY OF THE STATES HAVE ADOPTED ALCOHOLISM AND INTOXICATION TREATMENT ACTS WHICH MAKE POLICE OFFICERS CIVIL CARETAKERS OF INTOXICATED PERSONS.

A police officer in the State of Oregon is statutorily authorized to employ certain procedures when encoun-

tering an apparently intoxicated or drug-influenced person in a public place. O.R.S. 426.460 provides:

> "(1) Any person who is intoxicated or under the influence of controlled substances in a public place may be taken or sent home or to a treatment facility by the police. However, if the person is incapacitated, the health of the person appears to be in immediate danger, or the police have reasonable cause to believe the person is dangerous to self or to any other person, the person shall be taken by the police to an appropriate treatment facility. A person shall be deemed incapacitated when in the opinion of the police officer or director of the treatment facility the person is unable to make a rational decision as to acceptance of assistance."
>
> "* * * *
>
> "(3) In the absence of any appropriate treatment facility, an intoxicated person or a person under the influence of controlled substances who would otherwise be taken by the police to a treatment facility may be taken to the city or county jail where the person may be held until no longer intoxicated, under the influence of controlled substances or incapacitated."

By virtue of this state law, police in Oregon are required to take intoxicated or drug-influenced persons into custody for treatment in extreme emergency situations. In less extreme circumstances, a police officer is specifically authorized to take the intoxicated or drug-influenced person into custody to transport the person to his or her home, or to a treatment facility, or jail for detoxification.

These statutory procedures were prescribed by the Oregon Legislature in its 1971 enactment of the Al-

coholism and Intoxication Treatment Act, Oregon Laws 1971, chapter 622. The procedures are comparable to those set out in the Uniform Alcoholism and Treatment Act § 12(6), approved in 1971 by the Commissioners on Uniform State Laws. 9 Uniform Laws Annotated 57, 81 (West, 1979). The Uniform Act provides:

> "A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police or emergency service patrol and forthwith brought to an approved public treatment facility for emergency treatment. [If no approved public treatment facility is readily available he shall be taken to an emergency medical service customarily used for incapacitated persons.] The police or the emergency service patrol, in detaining the person and in taking him to an approved public treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime." *Id.* at 81.

In addition to Oregon, thirty-four states and the District of Columbia have laws identical or comparable to this provision of the Uniform Act.[2]

The purpose of the Uniform Act is "to provide States with the legal framework within which to approach alcoholism and public intoxication from a

[2]These state laws are listed in Appendix C.

health standpoint, as recommended by the courts, commissions, and professional organizations." Commissioner's Prefatory Note, 9 Uniform Laws Annotated, *supra,* at 58. The purpose of the Uniform Act's section on protective custody is to provide a "civil procedure" which is "similar to the way in which the police provide emergency assistance to other ill people, such as those in accidents or those who have sudden heart attacks." Commissioner's Note, 9 Uniform Laws Annotated, *supra,* at 82.

The intent of the Oregon Legislature in adopting its version of the Uniform Act was to create a civil treatment procedure to replace former criminal law methods of dealing with alcoholics and drunk persons. Minutes, Oregon House of Representatives, Committee on Health, Education and Welfare, May 7, 1971, page 4. The Legislature's policy is expressly stated in O.R.S. 430.315:

> "The Legislative Assembly finds alcoholism or drug dependence is an illness. The alcoholic or drug-dependent person is ill and should be afforded treatment for his illness."

The purpose of Act was aptly described by the dissenting Justices of the Oregon Supreme Court in the present case:

> "This statute was enacted as a reform, superseding so-called 'status crimes' such as 'public intoxication,' which were invalidated in cases such as *Robinson v. California,* 370 US 660, 82 S Ct 1417, 8 L Ed2d 758 (1962), and particularly *Powell v. Tex-*

> *as,* 392 US 514, 88 S Ct 2145, 20 L Ed 1254 (1968). The theory of the entire legislation was that intoxication without more should be dealt with by the state as a civil problem. The state was to be helper or protector of the afflicted and no longer prosecutor of the criminal. * * *" *State v. Newman,* 292 Or. 216, 225, 637 P.2d 148 (1981) (Tanzer, J., dissenting); *accord,* Commissioner's Notes, Uniform Alcoholism and Intoxication Treatment Act, 9 Uniform Laws Annotated, *supra,* at 57-59, 82.

O.R.S. 426.460 and its counterparts in thirty-five other jurisdictions cast police officers in the role of community caretakers in their dealing with publicly intoxicated persons. In the present case, a police officer came upon the unconscious respondent sitting behind the steering wheel of a disabled automobile parked in a no-parking zone at 5:30 in the morning. After the officer roused the respondent, a young woman, he attempted to learn her age and identity. The respondent appeared to be younger than the 22 years she reported. The driver's license identification which she produced did not appear to fit the respondent. When the officer detected alcohol on the respondent's breath, he assumed that she was intoxicated. The respondent was hysterical, crying, antagonistic, and extremely moody. The officer could have arrested the defendant for the state criminal offenses of driving under the influence of intoxicants and misuse of a driver's license. However, consistent with the state's Alcoholism and Intoxication Treatment Act, the officer decided to take the respondent into protective custody for

detoxification. The officer thus assumed the role of caretaker rather than criminal investigator. In the course of performing his caretaking function, immediately after taking respondent into custody, the officer attempted to discern her true identity by searching her purse.

By holding that the officer's search was impermissible, the Oregon Supreme Court has, as a matter of federal constitutional law, erroneously erected an impractical barrier to the execution of social welfare legislation that has been promulgated by a vast majority of states. The Oregon court's characterization of the officer's conduct as unnecessary, and therefore constitutionally unreasonable, conflicts with the pertinent opinions of this Court and the better-reasoned opinions of other appellate courts.

In the context of the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643 (1961), this Court has considered two relevant aspects of the community caretaking function of state and local governments: concern for the safety of the general public and concern for the safety of property. In *Cady v. Dombrowski,* 413 U.S. 433, 446-48 (1973), this Court upheld a warrantless search of the trunk of the disabled car of a drunk driver on the ground that the search, conducted as a standard police procedure, was reasonably necessary to protect the public since the driver, an off-duty

police officer, may have had a weapon in his car. In the area of administrative regulation, this Court has recognized that warrantless searches of premises are reasonable and do not violate the Fourth Amendment if prompt inspections are required by emergency conditions posing a danger to public health. *Camara v. Municipal Court,* 387 U.S. 523, 539 (1967); *see, Michigan v. Tyler,* 436 U.S. 499, 509 (1978); *cf., Mincey v. Arizona,* 437 U.S. 385, 392-93 (1978). In *South Dakota v. Opperman,* 428 U.S. 364, 375-76 (1976), this Court held that a warrantless police search of the glove compartment of an automobile impounded for traffic violations did not violate the Fourth Amendment because the search was reasonably conducted as part of a non-investigatory procedure to protect and secure the valuable belongings of the car's owner. *See also, Harris v. United States,* 390 U.S. 234 (1968); *Cooper v. California,* 386 U.S. 58 (1967).

Underlying all of these decisions is this Court's recognition that "the ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski, supra,* 413 U.S. at 439. Although warrantless searches are presumptively unreasonable, the fact that state and local police frequently encounter drivers and their vehicles in the performance of "community caretaking functions totally divorced from the detection, investigation, or acquisition of evidence re-

lating to the violation of a criminal statute" requires the courts to focus on two questions: was the challenged search "unreasonable solely because the local officer had not previously obtained a warrant"; and if not, was the warrantless search unreasonable? 413 U.S. at 439, 441, 442.

In the present case, the purpose of the initial intrusion upon the respondent's privacy was to render possible aid to an unconscious person sitting behind the steering wheel of a disabled car. The purpose of the subsequent custodial seizure of the respondent was to protect her health and the safety of other motorists. The initial seizure of the respondent's purse from the street fulfilled the community caretaking function of protecting the respondent's property. The officer's purpose in conducting a limited search of the purse was to determine the identity of the respondent, who had actively concealed her identity. The officer's conduct met the requirements of this Court's applicable decisions. As Justice Tanzer's dissenting opinion below pointed out:

> "It may not be essential for the officer to know the identity of the person he is taking into custody, but it is certainly reasonable. The officer and the government entity which he represents would reasonably want to have a record of the identity of the person seized if they are later sued for false arrest. Also, it is reasonable for the police to want to know who the person is in case she were to escape from custody. It is true that the police sometimes shelter derelicts with no known identity, but this defend-

> ant is not a derelict, and one optimistic purpose of the law is to help prevent her becoming one. She is a 19-year-old woman and an object of the law is to provide some protection for her. It is reasonable for the police to be able to consider taking her home or calling her parents to take her home, for example, as ORS 426.460 authorizes, regardless of whether she wants them called. That requires that the police know her identity and it is reasonable for them to take action toward that end." *State v. Newman, supra,* 292 Or. at 226, 637 P.2d at 148 (Tanzer, J., dissenting, joined by Tongue, J. and Peterson, J.).

In the different but analogous context of a criminal investigation, this Court has held that, based upon an officer's reasonable suspicion of criminal activity, "[a] brief stop of a suspicious individual, in order to determine his identity . . . may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams,* 407 U.S. 143, 146 (1972). *Compare with Brown v. Texas,* 443 U.S. 47, 52-53 (1973). The authority to stop and to request identification based upon reasonable suspicion, as recognized in *Adams v. Williams, supra,* would be reduced to a mere fiction if the officer had no recourse when the subject refused to produce identification. On the basis of such reasoning, the Wisconsin Supreme Court has held that, consistent with the Fourth Amendment, a police officer who lawfully stops a suspect who refuses to identify himself may seize the suspect's wallet and search it for documents of identification. *State v. Flynn,* 92 Wis. 2d

427, 446, 285 N.W.2d 710, 718 (1979). In that case, as here, the officer had reason to believe the detained person was in possession of identification materials.

Proper consideration of the rationales of this Court's decisions in *Cady v. Dombrowski, supra,* and *South Dakota v. Opperman, supra,* and due regard for the implications of this Court's statements in *Adams v. Williams, supra,* compel the conclusion that the officer's identification search in this case was constitutionally reasonable and, therefore, permissible. The Oregon Supreme Court's contrary conclusion is in conflict with this Court's interpretation of the Fourth Amendment in the community caretaking context.

II.

THE OREGON SUPREME COURT'S DECISION IS IN CONFLICT WITH THIS COURT'S INTERPRETATION OF THE FOURTH AMENDMENT IN THE CONTEXT OF SEARCHES INCIDENT TO FULL CUSTODY SEIZURES. THE DECISIONS OF THE FEDERAL AND STATE APPELLATE COURTS WHICH HAVE CONSIDERED SEARCHES INCIDENT TO THE CUSTODY PROCEDURES OF STATE ALCOHOLISM AND INTOXICATION TREATMENT ACTS ARE IN CONFLICT, AND A MAJORITY OF THOSE DECISIONS ARE INCONSISTENT WITH THE DECISIONS OF THIS COURT.

In *United States v. Robinson,* 414 U.S. 218, 236 (1973), this Court held that a warrantless search of a person subject to a full-custody arrest for a traffic law offense did not violate the Fourth Amendment. In

Gustafson v. Florida, 414 U.S. 260, 266 (1973), this Court held that a warrantless search of a person and of a closed container found on the person were constitutionally permissible. The Court stated its reasoning in the following terms:

> "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson, supra,* 414 U.S. at 235; *Gustafson v. Florida, supra,* 414 U.S. at 263-64.

The Court reached these conclusions after canvassing early precedents which justified searches incident to arrest on the need to protect the arresting officer, the need to preserve evidence, and the need to identify the suspect.[3]

More recently, in *New York v. Belton,* — U.S. —, 101 S Ct 2860, 69 L.Ed. 2d 768, 775 (1981), this Court held that the permissible scope of a warrantless search incident to arrest included the passenger compartment of a car which the arrestee was occupying at the time

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[3] In its survey of earlier precedents in *United States v. Robinson, supra,* 414 U.S. at 232, the Court quoted the following from *Holker v. Hennessey,* 141 Mo. 527, 539, 42 S.W. 1090, 1093 (1897):

> "Generally speaking, in the absence of a statute, an officer has no right to take any property from the person of a prisoner except as may afford evidence of the crime charged, *or means of identifying the criminal,* or may be helpful in making an escape." (Emphasis supplied).

of his arrest, and any closed containers therein. In that case, a police officer had stopped a vehicle for a speeding offense and detected evidence of unlawful possession of marijuana. After he removed the occupants from the car and put them in different areas of the highway, the officer searched the car, found defendant's jacket inside, searched the jacket, and discovered cocaine. The Court concluded that the officer's search of the jacket did not violate the Fourth and Fourteenth Amendments. Because it characterized the jacket search as incident to the suspect's arrest, the Court distinguished it from the warrantless, probable cause searches of closed containers which were held to be impermissible in *United States v. Chadwick,* 433 U.S. 1 (1977), and *Arkansas v. Sanders,* 442 U.S. 753 (1979).

Unless the Fourth Amendment requires a different analysis in civil arrest cases than in criminal arrests, the present case cannot meaningfully be distinguished from *Robinson, Gustafson* and *Belton.* The arresting officer clearly had probable cause to believe that respondent was intoxicated, and it is undisputed that the officer effected a full-custody seizure of the respondent pursuant to Oregon's Alcoholism and Intoxication Act.

The United States Court of Appeals for the Ninth Circuit has considered a comparable situation involving a seizure of persons under the State of Washing-

ton's version of the protective custody provision of the Uniform Alcoholism and Intoxication Treatment Act, Wash. Rev. Code Ann. § 70.96A120(2). In *United States v. Gallop,* 606 F.2d 836, 839 (9th Cir. 1979), the Ninth Circuit held that a purse-like bag of a detained inebriated person could be searched at the detoxification facility under the inventory procedures of *South Dakota v. Opperman, supra.*[4] However, the court also held the search of the bag could *not* be justified under *United States v. Robinson, supra,* as a search incident to arrest. 606 F.2d at 838. The court based this holding on the fact that Washington law expressly states that protective custody for detoxification is not an "arrest." *Id.* The Supreme Court of Alaska has reached a similar conclusion on the arrest question under its version of the Uniform Alcoholism and Intoxication Treatment Act, ruling that an officer may conduct only a limited search for weapons. Unlike the Ninth Circuit,

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[4] Although the Oregon Supreme Court did not discuss the propriety of searches of the effects of an intoxicated person at a treatment facility or jail, Oregon statutory law would have required the responsible health officer or jailer to have inventoried such a person's effects upon commitment. O.R.S. 133.455 provides:

"(1) Whenever any jailer, peace officer or health officer takes or receives any money or other valuables from any person in custody for safekeeping or for other purposes, the officer or jailer receiving such valuables or money forthwith shall tender one of duplicate receipts for the property being surrendered to the person in custody. If possible, the person in custody shall countersign both the original and duplicate receipts. If the person is unable to sign the receipts or receive the duplicate thereof, the same shall be signed by and delivered to the person when reasonably possible. A file of the original receipts shall be kept for at least six month after the money or valuables have been returned to the person in custody, his agent or representative or other person entitled to the same.

"(2) A person violating any of the provisions of subsection (1) of this section commits a Class B misdemeanor."

however, the Alaska court also held that an inventory search at the detention facility is unreasonable. *Peter v. State,* 531 P.2d 1263, 1271, 1272 (Alaska 1975); *semble, Walden v. State,* 397 So.2d 368 (Fla. App. 1981).[5]

The distinction drawn by the Ninth Circuit and the Alaska Supreme Court between protective custody seizures and criminal arrests is meaningless for purposes of federal constitutional analysis. This Court's decision in *Dunaway v. New York,* 442 U.S. 200 (1979), holding that detention for custodial interrogation must be based upon probable cause, makes it clear that it is the magnitude of the intrusion of a seizure, not whether the particular seizure is termed an "arrest" under state law, that determines the mode of constitutional analysis. 442 U.S. at 212, 216; *see Cupp v. Murphy,* 412 U.S. 291 (1973). The United States Court of Appeals for the Tenth Circuit has recognized the significance of *Dunaway v. New York, supra,* in the context of a search incident to a significant detention which was not technically regarded as an arrest. In *United States v. Matthews,* 615 F.2d 1279, 1286 n. 11 (10th Cir. 1980), the court said:

"*Dunaway v. New York* notes the difference

[5]The California Supreme Court, construing the state constitution, has similarly ruled that publicly intoxicated persons transported to jail facilities for temporary detention or detoxification generally may be subjected to only a pat-down search for weapons. *People v. Maher,* 17 Cal. 3d 136, 130 Cal. Rptr. 508, 550 P.2d 1044 (1976); *People v. Longwill,* 14 Cal. 3d 943, 123 Cal. Rptr. 297, 538 P.2d 753d (1975).

when the term 'arrest' is used in the traditional sense as being 'synonymous with those seizures governed by the Fourth Amendment' and when used in a technical sense as having a different meaning, *e.g.*, a formal charge against the person detained. Despite the different meanings of the term, *Dunaway* concludes that 'detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.' 442 U.S. at 216, 99 S. Ct. at 2258.

"We read cases defining the right to make a search incident to a lawful arrest, *e.g., Chimel v. California,* 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2039-40, 23 L.Ed.2d 685, to use the term 'arrest' in its traditional but broader sense, thus including a *Dunaway*-type detention. Hence we feel that the search incident to a lawful arrest exception would apply in a situation such as the case before us, whether or not labeled an arrest in the technical sense. Moreover reasons for the exception — the need for search measures protective of the officers and prevention of destruction of evidence — logically apply in the setting of investigative custody as well as when an actual arrest occurs. *See, Chimel, supra,* 395 U.S. at 763, 89 S.Ct. at 2040."

In *United States v. Robinson, supra,* 414 U.S. at 235, this Court held that the Fourth Amendment does not require a case-by-case evaluation of the intensity of searches incident to full custody seizures:

"The authority to search the person incident to a lawful custodial arrest, while based on the need to disarm . . . does not depend on what a court may later decide was the probability in a particular

arrest situation that weapons . . . would in fact be found * * *."

In the present case, the officer's search of the respondent's purse was justifiable under the police protection ground of *Robinson* and *Gustafson*. In a substantially similar situation, involving a full body search incident to a taking of an intoxicated person into protective custody under the Arizona Intoxication and Alcoholism Treatment Act, the Arizona Court of Appeals concluded that the search was permissible under *Robinson* and *Gustafson* "since the defendant was to be placed in a [treatment] facility and it was only reasonable and prudent that the officers conduct a search of defendant's clothing to make sure he was not carrying weapons or contraband items into the treatment center." *State v. Kennel,* 26 Ariz. App. 147, 546 P.2d 1156, 1157-58 (1976). For similar reasons, the officer's determination of the requisite intensity of a permissible search for identification materials should not have been second-guessed by the Oregon Supreme Court.

The Oregon Supreme Court majority's decision, unlike the Arizona court's opinion, does not properly apply the learning of this Court's pertinent decisions. The majority opinion below held that the full custody seizure in this case "was not an arrest situation." *State v. Newman, supra,* 292 Or. at 224, 637 P.2d at 147. The majority thought it "questionable" whether a war-

rantless search of the respondent's purse would have been permissible even in a lawful criminal arrest situation. 292 Or. at 223 n. 8, 224, 637 P.2d at 146 n. 8, 147. The majority's doubt was based upon its erroneously narrow reading of *New York v. Belton, supra,* which it found inapplicable because the purse was outside the passenger compartment, despite the fact that it must have been in the respondent's control area at the time she was removed from the car. The majority failed to grasp the significance of the facts in *Belton* described above. Only the dissent paid due respect to this Court's decisions in *Robinson, Gustafson,* and *Dunaway* when it said:

> "Upon taking [the respondent] into custody on either basis, criminal or civil, it was reasonable for the officer to take action to learn the identity of the person. Having completely deprived that person of liberty and privacy by taking her into custody, it was also reasonable for the officer to look for evidence of identity in a place where such evidence is likely to be found, *i.e.,* a wallet or purse. We so held in the arrest case of *State v. Florance,* 270 Or 169, 527 P2d 1202 (expressly overruling *State v. O'Neal,* 253 Or 163, 444 P2d 451 (1968), which barred an officer from doing so at the time of arrest). That look was a negligible increment to the loss of privacy the person had already suffered." *State v. Newman, supra,* 292 Or. at 226, 637 P.2d at 148 (Tanzer, J., dissenting).

The majority opinion of the Oregon Supreme Court is in conflict with applicable decisions of this Court. A

majority of the conflicting decisions of other appellate courts in similar contexts are likewise flawed.

III.

THE CLEAR IMPLICATION OF THE OREGON SUPREME COURT'S DECISION IS THAT A POLICE OFFICER'S SEARCH OF A PUBLICLY INTOXICATED PERSON'S EFFECTS, IN THE PERFORMANCE OF A CIVIL CARETAKING FUNCTION, VIOLATES THE FOURTH AMENDMENT UNLESS THE PERSON APPEARS TO BE IN A CRITICAL MEDICAL CONDITION. THE DECISION THUS HOLDS ILLEGAL AN IMPORTANT GOVERNMENTAL ACTION, A POLICE OFFICER'S ATTEMPT TO DETERMINE INITIALLY THE TYPE OF CARE WHICH SHOULD BE AFFORDED TO A PUBLICLY INTOXICATED PERSON. THE CONSEQUENCE OF THIS DECISION IS TO DISCOURAGE POLICE FROM MAKING GOOD FAITH EFFORTS TO PROTECT THE HEALTH OF PUBLICLY INTOXICATED PERSONS, EVEN IF SUCH EFFORTS ARE REASONABLE.

In their consideration of the Fourth Amendment issue presented, the Oregon Supreme Court and Oregon Court of Appeals held "that the facts of this case did not present the officer with a medical emergency justifying an immediate search." *State v. Newman, supra,* 292 Or. at 221, 637 P.2d at 146; *State v. Newman, supra,* 49 Or. App. at 320, 619 P.2d at 934. The emergency situation exception to the general requirement that searches be made pursuant to a warrant has been recognized by this Court in non-criminal and

criminal investigatory situations. In *Camara v. Municipal Court, supra,* 387 U.S. at 539, the Court pointed out that warrantless civil inspections of premises had traditionally been upheld in emergency situations involving danger to public health.[6]. In *Michigan v. Tyler, supra,* 436 U.S. at 509-10, the Court said that a warrantless inspection of the scene of a fire promptly after extinguishment of the blaze to prevent recurrence and to detect continuing dangers was reasonable and, therefore, constitutionally permissible. In *Mincey v. Arizona, supra,* 437 U.S. at 392-93, the Court said that it did not question the authority of the police to conduct warrantless searches in response to emergency situations "when they reasonably believe that a person is in need of immediate aid." In support of this proposition the Court cited *Wayne v. United States,* 115 U.S. App. D.C. 234, 241, 318 F.2d 221 (D.C. Cir. 1963) (Burger, J.) and numerous other federal and state appellate decisions. *Mincey v. Arizona, supra,* 437 U.S. at 392-93 nn. 6, 7.

Numerous federal and state appellate courts have applied the Fourth Amendment emergency doctrine in sustaining warrantless searches of unconscious or semiconscious persons and their immediately acces-

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[6]In support of this proposition, the Court cited its prior decisions, *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) (compulsory small pox vaccination); and *Compagnie Francaise v. Board of Health,* 186 U.S. 380 (1902) (health quarantine).

sible personal effects, when the searching officer's purpose is to protect the person's health by attempting to discern the cause of the person's medical condition[7] or to identify the person.[8] Evidently, the basis of the Oregon appellate court's distinction of these authorities was the fact that in this case the police were able to rouse the respondent to consciousness, whereas the police were unable to do so in the cases decided by other courts.

Although police involvement with unconscious or semi-conscious persons fits more comfortably within this Court's description of the emergency situation exception in *Mincey,* the fact that a police officer is able to restore an initially incapacitated person to consciousness does not necessarily render his further attempts to aid the person constitutionally unreasonable if his efforts involve a warrantless search. Because the officer is not prohibited by the Fourth Amendment from taking prompt action to detect possible continuing danger and to prevent recurrence of a dangerous condition, *see Michigan v. Tyler, supra,* 436

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[7] *E.g., United States v. Haley,* 581 F.2d 723 (8th Cir. 1978); *United States v. Dunavan,* 485 F.2d 201 (6th Cir. 1973); *Vauss v. United States,* 370 U.S. F.2d 250 (D.C. Cir. 1966); *Evans v. State,* 364 So.2d 93 (Fla. App. 1978); *People v. Smith,* 47 Ill.2d 161, 265 N.E.2d 139 (1970); *Guardiola v. State,* 375 N.E.2d 1105 (Ind. 1978); *Howell v. State,* 300 So.2d 774 (Miss. 1974); *Patella v. State,* 367 S.W.2d 340 (Tex. Cr. App. 1963); *see State v. Prober,* 98 Wis.2d 345, 297 N.W.2d 1 (1980).

[8] *E.g., United States v. Haley, supra; United States v. Dunavan, supra; Vauss v. United States, supra; People v. Gonzales,* 182 Cal. App. 2d 276, 5 Cal. Rptr. 920 (1960); *People v. Smith, supra; State v. Agent,* 101 N.J. Super. 190, 243 A.2d 846 (1968); *State v. Jordan,* 79 Wash.2d 484, 487 P.2d 617 (1971).

U.S. at 510, it cannot be said, as a matter of constitutional law, that the applicability of the emergency-situation exception to the warrant requirement depends solely upon the degree of an apparently intoxicated person's consciousness.

The Oregon Supreme Court's contrary legal conclusion was not based upon a reasonable construction of the facts of this case. The officer found the respondent "passed out" behind the steering wheel of a disabled vehicle. The officer had to shake the respondent in an attempt to restore her to consciousness. She thereafter manifested hysteria, antagonism, and an extremely moody disposition. She concealed her age and identity. Although the officer was not presented with a dire emergency, he was nonetheless faced with a situation sufficiently exigent to authorize prompt investigation to determine the proper course of care. Information about the respondent's age, address, and concerned family members or associates was relevant to this determination. Information about the existence of any chronic medical condition suffered by the respondent, such as diabetes or epilepsy, was also relevant. Under these extraordinary circumstances, it was reasonable for the officer to seek this information from what was apparently the only immediately accessible source, the respondent's purse.

Another reasonable conclusion to be drawn from the facts of this case is that the police officer's search

of the respondent's purse was conducted in a good-faith effort to extricate the respondent from an unhealthy situation. The officer's action was consistent with the purposes of the Alcoholism and Intoxication Treatment Act. His failure to take such an affirmative step might have subjected him to a civil negligence claim if the respondent had suffered injury as a result of the officer's failure to discern a readily identifiable medical problem. Although the Act provides that a police officer's good faith is a defense to a civil claim, O.R.S. 426.470,[9] the Fourth Amendment has not been interpreted by this Court to preclude the application of the sanction of the exclusionary rule in a criminal matter on a similar basis.[10] The effect of the Oregon Supreme Court's decision in this criminal case is to discourage the police from performing acts consistent with Oregon civil law. Because the Oregon Supreme Court's failure to apply the emergency doctrine in this case has created such an anomaly, review by this Court is appropriate.

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[9]O.R.S. 426.470 provides:

"No peace officer, treatment facility and staff, physician or judge shall be held criminally or civilly liable for actions pursuant to ORS 426.450 to 426.470, 430.100 and 430.315 to 430.335 provided he acts in good faith, on probable cause and without malice."

[10]The Fifth Circuit has enunciated a "good faith" exception to the exclusionary rule in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980).

CONCLUSION

The Oregon Supreme Court misinterpreted the Fourth Amendment in resolving the issue presented in this case. The significance of the issue transcends this particular case. For all the reasons discussed above, this petition for a writ of certiorari to the Oregon Supreme Court should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON,
Respondent on Review,
v.
PATRICIA ANN NEWMAN,
Petitioner on Review.

(TC C 79-10-33601, CA 16600, SC 27594)

On Review from the Court of Appeals. *

Argued and submitted May 5, 1981.

Nancy R. Walseth, Portland, argued the cause for petitioner. With her on the briefs were Richard A. Van Hoomissen and Cooney & Van Hoomissen, Portland.

Thomas H. Denney, Assistant Attorney General, argued the cause for respondent. With him on on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

CAMPBELL, J.

Tanzer, J., filed a dissenting opinion. Tongue, J., and Peterson, J., joined in the dissent.

The decision of the Court of Appeals is reversed. The decision of the trial court is affirmed.

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* Appeal from Judgment of Circuit Court for Multnomah County, Phillip J. Roth, Judge. 49 Or App 313, 619 P2d 930 (1981).

CAMPBELL, J.

The narrow issue in this case is: Can the police without a warrant in a noncriminal and nonemergency situation search the property of an intoxicated person for identification at the time the person is taken into custody?

On October 13, 1979, at about 5:30 a.m., Portland Police Officer Kenneth Pacheco saw an automobile parked in a no parking zone on Southeast McLoughlin Boulevard.[1] Both tires on the left side were flat and a person behind the steering wheel was leaning against the window on the driver's side. Pacheco parked the police car behind the disabled vehicle and approached it to investigate. The person behind the wheel was the defendant, who was the sole occupant of the automobile. The officer "knocked on the window a couple of times and got no reaction," so he opened the door and "shook the young lady a couple of times until she finally woke up." As to the next events the officer testified:

> "Basically I asked her — she looked very young and I asked how old she was. She said 22, and I asked if she had any identification and she just kept telling me she wanted to go home, and I continuously asked for identification and she wouldn't — she just kept saying, 'I want to go home,' and I could smell a moderate amount of alcohol on her breath and I assumed she was intoxicated."

Finally, the defendant reached into her purse and gave a driver's license to the officer. The license had been issued to Catherine M. Newman, age 22, with a Milwaukie, Oregon address.

Next, Officer Pacheco asked the defendant for a telephone number so that he could verify her identity. After some delay, she gave the officer a telephone number. He had the East Police Precinct call the number and they reported back that the person answering "had never heard of Catherine Newman or anybody by the name of Newman." The officer then asked the defendant for her parents' telephone number and she replied, "Well, take me wherever you want, but don't call my parents."

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[1] Our recital of the facts is taken from the transcript of the hearing on the defendant's motion to suppress evidence. Portland police officer Kenneth Pacheco was the only witness to testify at that hearing. The trial judge did not make specific findings of historical fact.

The officer did not think that the defendant was Catherine Newman or that she was 22 years of age. She did not respond to the name Catherine and in the officer's opinion she did not look like the photograph on the driver's license. Her condition and behavior "ranged from being hysterical to crying to being antagonistic and extremely moody."

Officer Davis arrived on the scene and he, with the approval of Officer Pacheco, handcuffed the defendant and placed her in the back of one of the patrol cars. Pacheco placed the defendant in custody "on a civil hold"[2] to take her either to the "detox[3] or the booking facility."[4] He did not intend to charge her with a violation of any law.

After the defendant was placed in the patrol car, Pacheco went back to her vehicle and found a woman's purse on the ground. The purse was closed and he opened it without the defendant's consent for the "sole purpose (of finding out) who she was." When the officer first opened the purse, he found a plastic bag containing white cross top pills . On a further search of the purse he discovered additional pills and a wallet. Inside the wallet was a driver's license issued to Patricia Ann Newman, age 19, with the same Milwaukie address as that listed on the previous driver's license. When confronted with the second driver's license, the defendant admitted that she was Patricia Ann Newman and that Catherine M. Newman was her sister.

The defendant was charged by a two count information with possession of a controlled substance, ORS 475.992, and with misuse of a driver's license, ORS 482.610. The defendant moved to suppress all evidence seized on October 13, 1979, on the ground that it was "unreasonably seized without a warrant and in violation of

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[2] We do not find the term "civil hold" used or defined in the Oregon Statutes or case law. There is no issue in this case concerning the definition of the term.

[3] ORS 430.306(4) defines a "detoxification center" as a publicly or privately operated nonprofit facility that provides emergency care or treatment for alcoholics. Neither party has contended that the defendant was an alcoholic or needed emergency care.

[4] Later in the hearing, Officer Pacheco testified that when the defendant was arrested on the controlled substance charge, he took her to the "booking facility" on the 7th floor of the Multnomah County Courthouse.

federal and state constitutions, statutes, and case law." The trial court allowed the motion to suppress and when the state declined to proceed to trial, the information was dismissed.

The state appealed to the Court of Appeals pursuant to ORS 138.060(1) and (3). The Court of Appeals reversed and remanded, 49 Or App 313, 619 P2d 930, (1981) holding that it was required to analyze the search on the basis of reasonableness because the standard of probable cause applied only to criminal cases and not to noncriminal situations.[5] The court found the search of the defendant's purse for identification was reasonable under the circumstances.

We disagree with the Court of Appeals that the search of the defendant's purse for identification was reasonable under the circumstances of this case and therefore reverse. The effect of this decision is to reinstate the trial court's order suppressing the evidence.

A person who is intoxicated in a public place may be taken home or to a treatment facility by the police. ORS 426.460(1).[6] If there is no appropriate treatment facility, the intoxicated person may be taken to a city or county jail where the person may be held until no longer intoxicated. ORS 426.460(3). There is nothing in the record to indicate what treatment facilities were available in Multnomah County.

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[5] The Court of Appeals cited *South Dakota v. Opperman*, 428 US 364, 370 n.5, 96 S Ct 3092, 49 L Ed 2d 1000 (1976) as authority for the proposition that the standard of probable cause applied only to criminal cases and not to noncriminal situations. Because of the result we reach, we find it unnecessary to consider the question.

[6] ORS 426.460(1) provides as follows:

"Any person who is intoxicated or under the influence of controlled substances in a public place may be taken or sent home or to a treatment facility by the police. However, if the person is incapacitated, the health of the person appears to be in immediate danger, or the police have reasonable cause to believe the person is dangerous to self or to any other person, the person shall be taken by the police to an appropriate treatment facility. A person shall be deemed incapacitated when in the opinion of the police officer or director of the treatment facilty the person is unable to make a rational decision as to acceptance of assistance."

The officer could smell a moderate amount of alcohol on the defendant's breath and assumed that she was intoxicated. Although there was a wide range in the defendant's behavior, she only became violent when she was told that she would be placed in handcuffs. The officer did not intend to charge her with a violation of a criminal law. Officer Pacheco testified as to his intention as follows:

> "I basically was going to place her in custody on a civil hold and either take her to the detox or the booking facility and another officer had to forcibly handcuff her and put her in the back seat."

There is testimony in the record that prior to the time the defendant was placed in the patrol car the officer was attempting to identify the defendant so that he could take her home. As to what he was attempting to learn after she was placed in the patrol car, Officer Pacheco testified that when he opened the purse "my sole purpose was to find out who she was."

Thus, the issue in this case narrows: Can the police without a warrant in a noncriminal and nonemergency situation search the property of an intoxicated person for identification at the time the person is taken into custody *for transportation to a treatment or holding facility?*

Neither party contends that Officer Pacheco was conducting a criminal investigation at the time he opened the purse. We agree with the Court of Appeals that the facts of this case did not present the officer "with a medical emergency justifying an immediate search." *State v. Newman, supra,* 49 Or App at 320. The defendant was suffering from ordinary intoxication from the use of alcohol. The search was a search of the defendant's property and not a search of her person. *State v. Brown,* 291 Or 642, 634 P2d 212 (1981), 2 LaFave, Search and Seizure 347 (1978).

This case boils down to a question of reasonableness. *State v. Tourtillott,* 289 Or 835, 618 P2d 423 (1980). Was it reasonable for Officer Pacheco to invade the

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We note that ORS 426.460 does not define "treatment facility." *See* ORS 426.460(7) and Legislative Counsel's Note: Oregon Laws 1973, ch 795, 2 and 3; and Oregon Laws 1979, ch 744.

defendant's privacy by opening her purse to find out who she was prior to taking her to a treatment or holding facility? We find that the officer's act was not reasonable under the circumstances of this case.

The purpose of a purse or handbag is to carry personal things. An individual's expectation of privacy in a purse is probably greater than in any other property except the clothing worn by a person. We do not think it was necessary for the police officer to know the name of the person that he was going to transport to the treatment or holding facility. The officer could have transported the defendant under the name of "Jane Doe." Many of the regular clients of detoxification centers, treatment and holding facilities are known only to their peers and the police as "Shorty," "Slim," "Red," or "Little Mac."

We do not reach the question whether or not the purse of the defendant could have been searched for identification as a part of the booking procedure at the treatment or holding facility. We hold only that it was not reasonable to search the defendant's purse for identification for the purpose of transporting the defendant to the facility.[7]

The dissent seems to attempt to broaden the scope of this case. It seems to assume that the police have statutory authority not only to take an intoxicated person home or to a treatment facility, but that the statute extends to taking a person into custody for that purpose by compulsion, i.e., without the person's assent and over her protests, even when the person is not "incapacitated" and there is no danger to her health or to any other person within the second sentence of ORS 426.460(1), *supra*. This assumption gives rise to a set of constitutional problems inherent in a "seizure" of a person for a non-penal purpose, including problems of the applicability and meaning of "probable cause," which we do not reach here.

We repeat that this case involves a nonemergency as well as noncriminal situation. We have held that only

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[7] As far as we know, this is the first appellate case in Oregon to deal with the search of the property of intoxicated persons since the Oregon legislature enacted ORS 426.460 in 1971. Cases from other jurisdictions are of very little help. *See* generally 85 ALR 3d 701.

the search of the purse is at issue here, not the officer's investigation of her physical condition and whatever "stop" this may have involved.

The dissent states that the officer had probable cause to arrest the defendant. We shall assume, for the sake of argument, that the dissent is correct, but the fact remains that the officer did not act upon that probable cause. Officer Pacheco did not arrest the defendant at any time prior to the search of the closed purse or the wallet found within the purse and therefore the search of those containers cannot be justified as incident to arrest.[8]

The dissent urges that because the officer had the legal authority to take the defendant as an intoxicated person into custody for transportation to her home or a treatment facility, it was reasonable for him to attempt to learn her identity. For the sake of argument, we will also assume that is correct. The dissent then states that by taking her into custody the officer had completely deprived her of her liberty. That seems obvious. The dissent further states that the officer, by taking her into custody, had completely deprived her of her privacy and from that argues that it was therefore reasonable to conduct, without her consent, a search of her purse and wallet to learn her identity. We cannot accept the proposition that by exercising authority to take the defendant into custody as an intoxicated person the officer had completely deprived her of her privacy. The dissent's ultimate conclusion is based on that premise.

The dissent's argument is really nothing more than the following: (1) The officer took the defendant into custody pursuant to authority to take an intoxicated person into custody for transportation to her home or a treatment facility. (2) The officer thereby "completely" deprived her

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[8] Even in the context of a criminal case it would have been questionable whether the police could have searched the defendant's purse without a warrant. The purse lay on the ground outside of the defendant's vehicle. It was a search of property and not a search of the defendant's person. *State v. Brown*, 291 Or 642, 634 P2d 212 (1981), 2 LaFave, Search and Seizure 347 (1978). It was not in the vehicle and therefore *New York v. Belton*, ___ US ___, 101 S Ct ___, 69 L Ed 2d 768 (1981) did not apply. The purse was in no man's land somewhere between *United States v. Robinson*, 414 US 218, 94 S Ct 467, 38 L Ed 2d 427 (1973) and *United States v. Chadwick*, 433 US 1, 97 S Ct 2476, 53 L Ed 2d 538 (1977).

of her privacy. (3) Since the officer had already completely deprived her of her privacy, it was reasonable for him to search her closed purse and wallet to learn her identity. We simply do not agree with that line of reasoning.

The dissent cites case law to support the above argument pertaining to an arrest situation. This was not an arrest situation. Even if it were, the authority to search these closed containers in the circumstances here presented would be questionable. *See n. 8, supra.*

The part of the dissent concerning the defendant's age and sex is window dressing. A "19-year-old woman" is just as much an adult as is a middle aged male-person. ORS 109.510. The testimony does not reveal any basis for the officer to conclude that this adult person lived with her parents. This adult person had expressed in no uncertain terms that she did not wish her parents to be notified. She even told the officer to take her wherever he wanted rather than the alternative of calling her parents. The dissent does not make it clear why the law is to treat this adult differently than any other adult in the same or similar circumstances.

The dissent takes us to task for limiting the operation of this opinion to these facts and thinks that we hedged when we said that we did not reach the question of searching the purse as a part of the booking procedure. The concept of dealing with intoxicated persons in a noncriminal setting is new in Oregon. The test of each step in the police procedure is reasonableness. We see no need to fill these pages with dictum. We also did not reach the questions of whether or not the police could have searched the purse for the purpose of taking the defendant to her home as opposed to taking her to a treatment or holding facilty or whether or not the officer could have searched her person as an incident of taking her into civil custody. It was not necessary to decide those questions.

Reversed.

TANZER, J., dissenting.

Today this court holds that it is constitutionally unreasonable for a police officer who takes an intoxicated 19-year-old from her automobile into civil custody after she

gives false information as to her identification, to look in her wallet to find out who she is and where she lives. I think the officer's action was reasonable. I think most people, judges or not, who are concerned about the welfare of their families and friends, particularly in a society beset with problems of alcohol and drug abuse, would also consider it reasonable. For this court to hold the officer's action to be constitutionally barred and the results subject to suppression in order to deter future similar police illegality is unreasonable. Understandably, the majority has cited no law, principle or precedent that actually supports its holding and I am aware of none.

The officer was acting under the authority of ORS 426.460(1):

> "Any person who is intoxicated or under the influence of controlled substances in a public place may be taken or sent home or to a treatment facility by the police. However, if the person is incapacitated, the health of the person appears to be in immediate danger, or the police have reasonable cause to believe the person is dangerous to self or to any other person, the person shall be taken by the police to an appropriate treatment facility. * * *"

This statute was enacted as a reform, superseding so-called "status crimes" such as "public intoxication," which were invalidated in cases such as *Robinson v. California,* 370 US 660, 82 S Ct 1417, 8 L Ed 2d 758 (1962), and particularly *Powell v. Texas,* 392 US 514, 88 S Ct 2145, 20 L Ed 2d 1254 (1968). The theory of the entire legislation was that intoxication without more should be dealt with by the state as a civil problem. The state was to be helper or protector of the afflicted and no longer prosecutor of the criminal. There is some contemporary dubiety about the state's role as helper or protector, but that is nevertheless the hopeful intent of the legislation. Looking at the facts in light of the statute, this officer's conduct was lawfully authorized.

In the early morning hours, the police officer came upon an intoxicated young woman in a parked automobile who gave him an operator's license which he had reason to believe was not her own and a home telephone number which he learned was not her own. The officer had probable cause to arrest her for both the crime of use of a false

operator's license and, possibly, for driving under the influence of intoxicants. He also had legal authority to take her to her home or to a treatment facility and to take her into custody for those purposes. He did not arrest her for either of these crimes. His decision to take civil action when he could lawfully have taken the more severe course of a criminal arrest is an indication of the reasonableness of the officer's action. Upon taking her into custody on either basis, criminal or civil, it was reasonable for the officer to take action to learn the identity of the person. Having completely deprived that person of liberty and privacy by taking her into custody, it was also reasonable for the officer to look for evidence of identity in a place where such evidence is likely to be found, *i.e.*, a wallet or purse. We so held in the arrest case of *State v. Florance*, 270 Or 169, 527 P2d 1202 (1974) (expressly overruling *State v. O'Neal*, 253 Or 163, 444 P2d 451 (1968), which barred an officer doing so at the time of arrest). That look was a negligible increment to the loss of privacy the person already suffered.

It may not be essential for the officer to know the identity of the person he is taking into custody, but it is certainly reasonable. The officer and the governmental entity which he represents would reasonably want to have a record of the identity of the person seized if they are later sued for false arrest. Also, it is reasonable for the police to want to know who the person is in case she were to escape from custody. It is true that the police sometimes shelter derelicts with no known identity, but this defendant is not a derelict, and one optimistic purpose of the law is to help prevent her becoming one. She is a 19-year-old woman and an object of the law is to provide some protection for her. It is reasonable for the police to be able to consider taking her home or calling her parents to take her home, for example, as ORS 426.460 authorizes, regardless of whether she wants them called. That requires that the police know her identity and it is reasonable for them to take action toward that end.

The majority purports to limit the application of the opinion to these facts. It would hold that it is unreasonable for an officer to search for identity when taking a person into custody, but it leaves open whether the same action would be reasonable when the person is booked into

some facility. *Cf. State v. Brown,* 291 Or 642, ___ P2d ___ (1981). This is an invented distinction with no theoretical foundation and the majority offers no legal support for it. Custody involves a loss of liberty and privacy to the degree reasonably required for purposes of custody. It is not a significantly greater intrusion on privacy to find out who the person is. The controlling fact is custody itself, not whether the custody is on the street or five minutes later at a holding facility. Once custody is established, it makes no difference whether the custodial officer is the arresting officer or a jailer and whether the place of custody is a police car or a building. *See United States v. Robinson,* 414 US 218, 94 S Ct 467, 38 L Ed 2d 427 (1973), and *Gustafson v. Florida,* 414 US 260, 94 S Ct 488, 38 L Ed 2d 456 (1973). The police either can or cannot reasonably look in a pocket or purse to determine the identity of a person in custody. I would hold they can. To hedge as the majority does raises a distinction without a difference which betrays the majority's lack of conviction in the rationale. The majority decides who wins, but it does not deal with the law of custody.

I dissent.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Appellant,
v.
PATRICIA ANN NEWMAN,
Respondent.

(No. C 79-10-33601, CA 16600)

Appeal from Circuit Court, Multnomah County.

Phillip J. Roth, Judge.

Argued and submitted June 23, 1980.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for appellant. With him on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Nancy Walseth, Portland, argued the cause for respondent. On the brief were Richard A. Van Hoomissen and Cooney & Van Hoomissen, Portland.

Before Joseph, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Reversed and remanded.

WARREN, J.

Pursuant to ORS 138.060(3), the state appeals the trial court's pretrial order suppressing evidence obtained through a warrantless search of defendant's purse. The state contends that the search, undertaken by a police officer to ascertain defendant's identity, was reasonable under the circumstances. We reverse and remand.

The only testimony at the hearing on the motion to suppress was that of Officer Pacheco, a police officer for the city of Portland. He testified that at about 5:30 a.m. on October 13, 1979, while on patrol, he saw a car parked in a posted no parking area in the 5200 block of Southeast McLoughlin. He noticed that the two tires on the left side of the car were flat, and that a woman, the defendant here, was sitting in the driver's seat with her head leaning against the window. Officer Pacheco parked his patrol car behind defendant's car and approached it to find out if the woman was sick or hurt. He knocked on the window several times and, receiving no response, he opened the driver's door and shook the woman until she awakened. In response to the officer's question, defendant answered that she was 22 years old. When Officer Pacheco asked for identification, defendant said that she wanted to go home. She repeated this statement several times, ignoring the officer's continued requests for identification. Officer Pacheco smelled a moderate amount of alcohol on defendant's breath and assumed she was intoxicated. Finally, defendant reached into her purse and gave the officer a driver's license with the name "Catherine Newman" which identified the holder as 22 years old. Officer Pacheco then asked defendant for a phone number to call, which defendant eventually supplied. When this number was contacted, the person answering stated that he had never heard of Catherine Newman or anyone by the name of Newman.

During this time, Officer Pacheco had developed serious doubts as to whether the young woman was "Catherine Newman." She did not react to the name "Catherine," appeared to the officer to be younger than her claimed 22 years, and, in the officer's opinion, did not appear to be the person whose picture was on the driver's license. Defendant refused to give the officer her parents'

telephone number, stating, "Well, take me wherever you want, but don't call my parents." A second officer handcuffed defendant and placed her in the back seat of the patrol car. Officer Pacheco testified that at this point he intended to place defendant in a "civil hold" and did not intend to charge defendant with violating any laws. Officer Pacheco then went to defendant's car and saw defendant's purse on the ground next to the car. He testified that the purse was closed and that he could not see into it. He opened the purse for the sole purpose of finding a driver's license or other reliable source of identification. Upon opening the purse he saw a plastic bag with white crosstop pills. He also found an amber glass filled with pills, some other pills on the bottom of the purse, and a wallet containing a driver's license for "Patricia Ann Newman." In the officer's opinion, the photograph on the driver's license resembled defendant more than did the photograph on the driver's license for Catherine Newman. The driver's license stated the birth date of Patricia Ann Newman was July 14, 1960, making her approximately 19 years and three months of age at the time. Officer Pacheco testified that that age was more consistent with defendant's appearance.

After finding the pills and the driver's license, Officer Pacheco walked back to his patrol car and read defendant her *Miranda*[1] rights. He asked defendant what the pills were doing there, and she said they were "speed." When she was confronted with the newly found driver's license, defendant admitted that she was Patricia Ann Newman.

Defendant was charged with possession of a controlled substance, ORS 475.992, and misuse of a driver's license, ORS 482.610. Following the suppression hearing, the trial court entered an order suppressing all evidence obtained through the warrantless search of defendant's purse. The state declined to proceed to trial and the court granted defendant's motion to dismiss both charges. The issue here is the validity of the "search."

A fundamental difficulty arises in attempting to apply the warrant requirement to the present search. In

[1] *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

both Article I, Section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution, the warrant requirement is "linked * * * textually" to the requirement that probable cause exist to search for evidence of crime. *South Dakota v. Opperman,* 428 US 364, 96 S Ct 3092, 49 L Ed 2d 1000, 1006 n. 5 (1976). Discussing the warrant requirement in the context of routine inventory searches of automobiles impounded by police, the United States Supreme Court stated:

> " * * * The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. erence omitted The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.
>
> "In view of the noncriminal context of inventory searches, and the inapplicability in such a setting of the requirement of probable cause, courts have held—and quite correctly—that search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept. We have frequently observed that the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate, unrelated to the criminal investigative-enforcement process. With respect to noninvestigative police inventories of automobiles lawfully within governmental custody, however, the policies underlying the warrant requirement * * * are inapplicable." 49 L Ed 2d at 1006 n. 5.

This reasoning is equally valid here. A search by an officer for identification of an intoxicated person in order to take action authorized under ORS 426.460 is not a search for evidence of a crime and the concept of probable cause is meaningless. Defendant does not suggest that the officer's action in opening the purse to search for identification was a subterfuge for a criminal investigation for contraband. Hence, no probable cause was necessary and the warrant requirement is inapplicable. Our analysis must center on the reasonableness of the search under the circumstances.

In *State v. Tourtillott,* ___ Or ___, ___ P2d ___ (October 21, 1980), defendant was stopped at a police roadblock set up by the Oregon State Police Game Division on a

rural road for the purpose of checking compliance with game laws, hunting licenses, and deer hunters' success for statistical purposes. When defendant was stopped and asked for her driver's license, she admitted that she was driving her vehicle while suspended. In affirming her conviction for driving with a revoked license, the Supreme Court noted:

> "In its most recent 'roving-stop' case, *Delaware v. Prouse, supra,* the Supreme Court balanced the intrusion on the individual's Fourth Amendment interests against the law enforcement activity's promotion of legitimate governmental interests. 440 US at 653-54. In doing so, the Court stated that the standard of 'reasonableness' was imposed 'upon the exercise of discretion by government officials, including law-enforcement agents.' *Id.* The balance test required by the Supreme Court binds us, as well, for the Fourteenth Amendment makes the Fourth Amendment applicable to the states.
>
> "The test is easily articulated. In determining the constitutionality of a particular government procedure, the promotion of the legitimate government interest at stake is balanced against the individual's right to have his or her privacy and personal security be free from arbitrary and oppressive interference. The Court has considered the following factors to be important:
>
> "(1) the importance of the governmental interest at stake:
>
> "(2) the psychologically and physically intrusive nature of the procedure;
>
> "(3) the efficiency of the procedure in reaching its desired goals; and
>
> "(4) the degree of discretion the procedure vests in the individual officers.
>
> " * * * * *
>
> "The Fourth Amendment prohibits unreasonable seizures. Since the key test is reasonableness, the balancing test adopted by the Supreme Court is uniquely adapted to make that determination. The facts and circumstances of each type of seizure must be balanced in determining its permissibility." (Slip opinion at 20-21.)

The state argues that we should hold the search valid under the rationale of *United States v. Haley,* 581 F2d 723 (8th Cir), *cert denied,* 439 US 1005, 99 S Ct 618, 58 L Ed 2d 681 (1978). In *Haley,* an officer responding to a report of

a traffic accident, and while blocks away from the reported accident site, found a man lying in the street and a car parked at the curb nearby with damage to the rear. The officer stopped to check the man's condition. He roused the man for a short time, during which the man indicated he was not hurt and that his name was Sam Haley. The officer found no indication that Haley was under the influence of alcohol. Attempting to verify the identity of Haley and the ownership of the parked car, the officer looked inside a zippered briefcase he found in the middle of the front seat of the car. He found identification for Sam Haley, and also a firearm. In the subsequent prosecution for illegal possession of a firearm, the court upheld the search of the briefcase against the defendant's challenge. The court ruled that the briefcase was "luggage" due the protections of the *Chadwick* warrant requirement. Nonetheless, the warrantless search was held to be justified by the exigent circumstances presented by the apparent medical emergency:

> "In this case, Officer Deal was presented with an emergency situation when he observed Haley lying on the street, and he reasonably believed that Haley was in need of immediate assistance. Haley's lapse from consciousness did not appear to be attributable to alcohol and Haley indicated he wasn't hurt. It was, thus, reasonable for the officer to seek identification or medical alert cards which might be of assistance." 581 F2d at 726.

Cases in a number of jurisdictions, including Oregon, recognize the authority of a police officer to make a warrantless search in an attempt to render emergency assistance to a person the officer reasonably believes to be in need of such assistance. *See, e.g., State v. Plant,* 28 Or App 771, 773 and n. 2, 561 P2d 647 (1977). In *Mincey v. Arizona,* 437 US 385, 98 S Ct 2408, 57 L Ed 2d 290 (1978), the United States Supreme Court stated:

> "* * * We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. * * * 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' Wayne v. United States, 115 US App DC 234,

241, 318 F2d 205, 212 (opinion of Burger, J.) And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. Michigan v. Tyler, [436 US 499, 509-10, 98 S Ct 1942, 56 L Wd 2d 486]; Coolidge v. New Hampshire, 403 US, at 465-466, 29 L Ed 2d 564, 91 S Ct 2022.

"But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.' Terry v. Ohio, 392 US,at 25-26, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 * * * *." 57 L Ed 2d at 300.

Many cases have upheld searches by police of persons who were found seriously injured or unconscious, in order to find identification, medical alert cards, or the names of persons to call in an emergency. *See, e.g., Vauss v. United States,* 370 F2d 250 (DC Cir 1966); *People v. Gonzales,* 182 Cal App 2d 276, 5 Cal Rptr 920 (1960); *People v. Smith,* 47 Ill 2d 161, 265 NE 2d 139 (1970); *People v. Smith,* 44 Ill 2d 82, 254 NE2d 492 (1969); *Floyd v. State,* 24 Md App 363, 330 A2d 677 (1975); *State v. Miller,* 486 SW 2d 435 (Mo 1972); *Perez v. State,* 514 SW2d 748 (Tex Crim App 1974). As in *United States v. Haley, supra,* justification for the search was found in the exigency created by the medical emergency.

In contrast to these cases, the facts here did not present Officer Pacheco with a medical emergency justifying an immediate search. There is no indication that the officer suspected that defendant was suffering from anything more serious than ordinary alcohol intoxication. Thus, the search cannot be sustained on the basis of cases applying the "medical emergency" exception to the warrant requirement.

In sum, neither of the parties has referred us to any cases dispositive of the issue before the court. Upon examining the facts and circumstances of the case, however, we conclude that the officer acted reasonably in opening defendant's purse to look for identification. Among Officer Pacheco's options upon finding defendant intoxicated were taking or sending defendant home or to a treatment facility, *see* ORS 426.460(1), or taking defendant to jail until she was no longer intoxicated. *See* ORS 426.460(3). In order to take or send defendant home, the officer needed to know defendant's home address or the name and number of

someone to call. Since defendant had been uncooperative in supplying Officer Pacheco with this information, the most likely source of identification was defendant's purse. As stated above, defendant does not contend that the need for identification was a pretext for a general search of defendant's car and belongings for evidence of a crime.

We believe that the discretion vested in police officers under ORS 426.460(1) to take intoxicated persons home rather than to jail in appropriate cases implies a significant governmental interest in the safety and well-being of the citizenry. We do not believe that defendant's lack of cooperation in identifying herself required the officers here to adopt a harsher posture toward her than that which they intended to adopt when they placed her on a civil hold. The search of defendant's purse for identification was neither physically nor psychologically intrusive and was, under the circumstances of this case, the most efficient means of ascertaining her identity. *Tourtillott, supra,* slip opinion at 20.

Based upon the foregoing, we hold that the officer's minimal intrusion upon defendant's privacy and personal security when he opened defendant's purse to search for identification was not unreasonable when balanced against the legitimate governmental interest to be served by the intrusion. Since the controlled substance the officer found immediately upon opening the purse was in plain view, the seizure of that substance was lawful. Accordingly, we hold that the trial court erred in ordering the evidence seized in the search of defendant's purse suppressed.

Reversed and remanded.

APPENDIX C

The following is a list of state laws which provide that a police officer may take an intoxicated person into protective custody for delivery at home or a detoxification center:

Alaska	Alaska Statutes § 47.37.170
Arizona	Arizona Revised Statautes § 36-2026
California	Annot. California Codes, Welfare and Institutions § 5170
Colorado	Colorado Revised Statutes 25-1-309(2)
Connecticut	Connecticut General Statautes Annot. § 17-155v
Delaware	Delaware Code Annot. 16 § 2211
D. C.	District of Columbia Code Encyclopedia n 24,524(a)(1)
Florida	Florida Statutes Annot. § 396.072
Georgia	Code of Georgia Annot. § 99-3911
Idaho	Idaho Code 39-307A(b)
Illinois	Illinois Annot. Statautes 19 1/2, ¶512 §12b
Iowa	Iowa Code Annot. § 125.34
Kansas	Kansas Statutes Annot. 65-4026(a)
Maine	Maine Revised Statutes Annot. 22 § § 1372, 7118
Maryland	Annot. Code of Maryland Art. 2C § 303
Massachusetts	Massachusetts General Laws Annot. 111B § 8
Michigan	Michigan Compiled Laws Annot. § 333.6501
Minnesota	Minnesota Statutes Annot. § 253A.04 Subd. 2
Montana	Montana Code Annot. 53-24-303
Nebraska	Revised Statutes of Nebraska § 53-1, 121
Nevada	Nevada Revised Statutes 458.270
New Hampshire	New Hampshire Revised Statutes Annot. 172-B:3
New Jersey	New Jersey Statutes Annot. 26:2B-16
New Mexico	New Mexico Statutes Annot. 46-14-3
New York	Consolidated Laws of New York Annot. § 21.09
North Carolina	General Statutes of North Carolina § 122-65.11
North Dakota	North Dakota Century Code Annot. 5-01-05.1
Ohio	Ohio Revised Code Annot. § 2935.33(c)
Oklahoma	Oklahoma Statutes Annot. 37 § 8.B
Oregon	Oregon Revised Statutes 426.460(1)
Rhode Island	General Laws of Rhode Island § 40.1-4-10
South Carolina	Code Laws of South Carolina § 44-51-450
South Dakota	South Dakota Codified Laws 34-20A-55
Vermont	Vermont Statutes Annot. T.18 § 9144
Washington	Revised Code of Washington Annot. 70.96A.120
Wisconsin	Wisconsin Statutes Annot. 51-45(11)

Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1625

STATE OF OREGON, Petitioner

v.

PATRICIA ANN NEWMAN, Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

---

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
REASONS FOR DENYING THE WRIT	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases Cited

Cady v. Dombrowski, 413 US 433 (1973)	1,2,5
Camara v. Municipal Court, 387 US 523 (1967)	1
Gustafson v. Florida, 414 US 260 (1973)	3
Michigan v. Tyler, 436 US 499 (1978)	1
Mincey v. Arizona, 437 US 385 (1978)	1
South Dakota v. Opperman, 428 US 364 (1976)	1
State v. Newman, 292 Or 216, 637 P2d 143 (1981)	1,2,4,5
Steagald v. United States, ___ US ___ (April 21, 1981)	2,5
United States v. Gallop, 606 F2d 836, 838 (9th Cir 1979)	4
United States v. Robinson, 414 US 218 (1973)	3,4

Oregon Statutory Provision

ORS 426.450(3)	3
ORS 426.450(4)	3

Miscellaneous Provision

Uniform Alcoholism and Treatment Act §12(b), 9 Uniform Laws Annotated 57, 81 (West, 1979)	3

QUESTION PRESENTED

Respondent submits that the question presented in this case is more accurately stated as follows:

> "Can the police without a warrant in a noncriminal and nonemergency situation search the property of an intoxicated person for identification at the time the person is taken into custody for transportation to a treatment or holding facility?" [1]

OPINIONS BELOW
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
STATEMENT OF THE CASE

Petitioner's statements of these matters are accepted.

REASONS FOR DENYING THE WRIT

I.

THE OREGON SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S INTERPRETATION OF THE FOURTH AMENDMENT IN THE CONTEXT OF THE POLICE "COMMUNITY CARETAKING" FUNCTION.

The present case is factually distinguishable from this Court's decisions involving the emergency exception[2] and the inventory exception[3] to the general warrant requirement. Petitioner's reliance thereon is misplaced. The present search does not involve an inventory search or an emergency search as conceeded by petitioner in the Oregon courts.

---

1 State v. Newman, 292 Or 216, 221, 637 P2d 143, 145-146 (1981).

2 Mincey v. Arizona, 437 US 385 (1978); Michigan v. Tyler, 436 US 499 (1978); Cady v. Dombrowski, 413 US 433 (1973); Camara v. Municipal Court, 387 US 523 (1967).

3 South Dakota v. Opperman, 428 US 364 (1976).

State v. Newman, 292 Or 216, 219, fn 3, 637 P2d 143, 144, fn 3 (1981). The facts should not be construed in a new light for the first time in this Court. Steagald v. United States, ___ US ___ (April 21, 1981); Cady v. Dombrowski, 413 US 433, 442 (1973).

Officer Pacheco contacted respondent, who was asleep and suffering from ordinary intoxication. After a significant period of questioning and observation of respondent, Pacheco decided to place her in custody "on a civil hold" and to take her either to the "detox or the booking facility". She was handcuffed and placed in the patrol car for transportation to the treatment or holding facility. He no longer considered transportation to her home or other measures as options. The Oregon Supreme Court specifically found that the officer searched the purse for identification in this noncriminal and nonemergency situation.

The court issued a narrow ruling:

> "* * * This case boils down to a question of reasonableness. State v. Tourtillott, 289 Or 835, 618 P2d 423 (1980). Was it reasonable for Officer Pacheco to invade the defendant's privacy by opening her purse to find out who she was prior to taking her to a treatment or holding facility? We find that the officer's act was not reasonable under the circumstances of this case. * * * We hold only that it was not reasonable to search for the defendant's purse for identification for the purpose of transporting the defendant to the facility." 292 Or at 221-222, 637 P2d at 146.

As the concept of dealing with intoxicated persons in a noncriminal setting was new in Oregon, the court elected not to issue an opinion filled with dictum. The court did not address the propriety of the 'stop", the officer's investigation of respondent's physical condition and the possible search of the purse as a part of the booking procedure. These issues were left for future adjudication.

This factual record is extremely limited. Because other aspects of the issue were not illuminated by the Oregon Supreme Court, the case is not ripe for review.

Likewise, the decision will have marginal impact on other jurisdictions. This case does not present a "significant" federal question.

II.

THE OREGON SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S INTERPRETATION OF THE FOURTH AMENDMENT IN THE CONTEXT OF SEARCHES INCIDENT TO ARREST.

In the second argument, petitioner claims a civil detention is not distinguishable from a criminal arrest for Fourth Amendment analysis (Pet at 22). It asserts "the officer's search of the respondent's purse was justifiable under the police protection ground" of United States v. Robinson, 414 US 218 (1973) and Gustafson v. Florida, 414 US 260 (1973). (Pet at 26).

Respondent believes temporary civil detention is categorically different than criminal custody. The Uniform Act provides: "A taking into protective custody under this section is not an arrest." Uniform Alcoholism and Treatment Act §12(b), 9 Uniform Laws Annotated 57, 81 (West, 1979). (See also legislative history in Pet at 11-15). An intoxicated person is temporarily detained to protect her health and the safety of other members of the public. She is "held until no longer intoxicated, under the influence of controlled substances or incapacitated". ORS 426.450(3). She must be released within 48 hours. ORS 426.450(4). The intoxicated person is not subjected to criminal interrogation or to a search for further evidence of criminal activity.

In contrast, an arrestee must run the gamut of the criminal justice system. Civil detention is analogous to the less intrusive criminal stop. In United States v. Robinson, supra, 414 US at 428, this Court explained:

> "'* * * An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are quite different. An arrest is the initial stage of a criminal prosecution * * *.' [Terry v. Ohio, 392 US 1 (1968)]."

The Oregon Supreme Court properly noted the difference in terms of privacy, as follows:

> "We cannot accept the proposition that by exercising authority to take the defendant into custody as an intoxicated person the officer had completely deprived her of her privacy. The dissent's ultimate conclusion is based on that premise." 292 Or at 223, 637 P2d at 147.

As protective custody is not an arrest, the officer could not justify the search as incident to arrest. United States v. Gallop, 606 F2d 836, 838 (9th Cir 1979).

Alternatively, the basis of a search incident to arrest is to preserve evidence and to protect the arresting officer. United States v. Robinson, supra. Petitioner's reliance on the "police protection ground" in support of this search for identification is without merit (Pet at 26). An identification card is not a dangerous instrumentality. Here, defendant was handcuffed and placed in the back of the patrol car. Opening the purse was an unjustified and unnecessary intrusion of defendant's privacy.[4]

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4 The record does not indicate that the two officers deemed it necessary to conduct a weapons frisk of respondent. Terry v. Ohio, 392 US 1 (1968). The propriety of an inventory search (to safeguard respondent's property) at the treatment or holding facility was not at issue.

III.

PETITIONER SHOULD BE PRECLUDED FROM RAISING THE EMERGENCY DOCTRINE FOR THE FIRST TIME IN THIS COURT.

As indicated in Section I, supra, petitioner did not contend that an emergency existed in its pleadings and arguments in the Oregon courts. "Neither party has contended that the defendant was an alcoholic or needed emergency care." State v. Newman, supra, 292 Or at 219, fn 3, 637 P2d at 144 fn 3. It should not be raised for the first time in this Court. Steagald v. United States, supra; Cady v. Dombrowski, supra.

The facts of the case support the conclusions of the Oregon Supreme Court and the Court of Appeals that "[T]his case did not present the officer 'with a medical emergency justifying am immediate search.'" State v. Newman, supra, 292 Or at 221, 637 P2d at 146.

CONCLUSION

The decision of the Supreme Court of the State of Oregon was clearly correct, and the petition for writ of certiorari should be denied.

Gary D. Babcock

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JOHN DAUGIRDA
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Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1625

STATE OF OREGON, Petitioner

v.

PATRICIA ANN NEWMAN, Respondent

On Petition for a Writ of Certiorari
to the Supreme Court
of the State of Oregon

PROOF OF SERVICE

I certify that I am a member of the bar of the Supreme Court of the United States and that, pursuant to Rule 28(3), I served the foregoing Brief for Respondent in Opposition with attached Motion and Affidavit for Leave to Proceed in Forma Pauperis upon Mr. James E. Mountain, Jr., counsel for petitioner, on May 11, 1982, by mailing to him a certified true copy thereof by first-class mail, postage prepaid, addressed to him at 100 State Office Building, Salem, Oregon 97310, which is his regular office mailing address.

All parties required to be served have been served.

Gary D. Babcock

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1625

STATE OF OREGON, Petitioner

v.

PATRICIA ANN NEWMAN, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Patricia Ann Newman, now residing at 13557 S.E. Kuehn Road, Milwaukie, Oregon, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari filed by the State of Oregon on March 1, 1982, to review an order of the Supreme Court of the State of Oregon dated December 9, 1981, without prepayment of costs and to proceed in forma pauperis. The respondent's affidavit in support of this brief in opposition is attached hereto.

Gary D. Babcock

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1625

STATE OF OREGON, Petitioner

v.

PATRICIA ANN NEWMAN, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Patricia Ann Newman, being first duly sworn according to law, depose and say, in support of my application for leave to proceed without being required to repay the costs or fees:

1. I am respondent in the above entitled case.

2. Because of my poverty I am unable to pay the costs of said cause, and still provide myself with the necessities of life.

3. I am unable to give security for the same, and still provide myself with the necessities of life.

4. I believe I am entitled to the redress I seek in said cause.

5. I am unable to obtain from the court below a certified copy of the record without payment of fees and costs.

6. I was charged in Multnomah County Circuit Court, Oregon, with possession of a controlled substance and misuse of a driver's license, in violation of Oregon Revised Statutes 475.992 and 482.610. I prevailed on my motion to suppress

physical evidence at the trial level. The state declined to proceed to trial and both charges were dismissed. The state appealed. The Oregon Court of Appeals reversed and remanded, 49 Or App 313, 619 P2d 930 (1980). Thereafter, the Oregon Supreme Court reversed the decision of the Court of Appeals and affirmed the pretrial order suppressing evidence and dismissing the charges, 292 Or 216, 637 P2d 143 (1981).

This brief in opposition is filed for the purpose of urging this court to deny the Petition for Writ of Certiorari sought by the State of Oregon.

Patricia Ann Newman, Respondent

Subscribed and sworn to before me this 3RD day of May, 1982.

NOTARY PUBLIC FOR OREGON
My Commission Expires: 11-13-85